PT Kiara Temasek Internasional v Inai Kiara Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-647–12 OF 2015
CHAN JIT LI JC
20 JUNE 2016

Civil Procedure — Striking out — Application for — Whether court should conduct minute examination of documents or facts — Whether matter ought to be determined at trial — Whether claim clearly unsustainable — Rules of Court 2012 O 18 r 19(1)

The dispute related to the construction of a breakwater for the new deep water terminal at Kuantan Port ('the project'). The third defendant appointed the first and second defendants as contractor to construct the project. The third defendant, however, was unhappy with the lack of progress of the project. To address this issue of delay, it was agreed that the plaintiff be appointed as an additional subcontractor. This plan, however, failed to placate the third defendant. It was then agreed that the contractor would surrender to the third defendant that part of the project which had earlier been awarded to the plaintiff. The third defendant's was also given the prerogative of appointing a new contractor to construct the surrendered area. The contractor then terminated the plaintiff's appointment. The plaintiff thus commenced this action against the first and second defendants alleging breach of contract and against the third defendant for inducing a breach or procuring a breach of contract. The third defendant applied to strike out the plaintiff's claim under O 18 r 19(1) of the Rules of Court 2012 contending that it was plainly and obviously unsustainable. It was the plaintiff's case that the breach of contract constituted of the acts of taking back the works awarded to the plaintiff and the subsequent award of the same to the new contractor resulting in the termination of the plaintiff's appointment.

Held, dismissing the application with costs of RM5,000:

(1) The tort of inducing a breach or procuring a breach of contract is committed when a third party deliberately interferes in the execution of a valid contract that has been concluded between two or more other parties (see para 19).

(2) It constitutes a tort of inducement to breach of contract if five conditions are fulfilled: (a) first, there must be either 'direct' interference or 'indirect' interference coupled with the use of unlawful means; (b) secondly, the defendant must be shown to have knowledge of the relevant contract; (c) thirdly, he must be shown to have had the intent to interfere with it;

(d) fourthly, in bringing an action, other than a quia timet action, the plaintiff must show that he has suffered special damage, that is, more than nominal damage; and (e) fifthly, so far as is necessary, the plaintiff must successfully rebut any defence based on justification which the defendant may put forward (see para 20).

(3) In an application under O 18 r 19(1) the court should not conduct a minute examination of the documents or facts to ascertain whether the defendant has a defence. If the third defendant was of the view that the manner in which it acted was justified in view of the delay in the project, then it was a matter which ought to be determined at a trial. The third defendant thus failed to show that the plaintiff's claim was clearly unsustainable (see para 37).

[Bahasa Malaysia summary

Pertikaian berkaitan kepada pembinaan tembok penahan ombak bagi terminal dalam baru di Pelabuhan Kuantan ('projek'). Defendan ketiga melantik defendan pertama dan kedua sebgaai kontraktor untuk membina projek tersebut. Defendan ketiga, walau bagaimanapun tidak berpuas hati dengan ketiadaan kemajuan projek tersebut. Bagi menangani isu kelewatan ini, ia dipersetujui bahawa plaintif dilantik sebagai subkontraktor tambahan. Pelan ini, walau bagaimanapun, gagal untuk menenangkan defendan ketiga. Ia dipersetujui bahawa kontraktor akan memberikan kepada defendan ketiga bahagian projek yang pada mulanya diawardkan kepada plaintif. Defendan ketiga juga diberikan prerogatif untuk melantik kontraktor baru untuk membina kawasan yang diberikan. Kontraktor kemudiannya menamatkan pelantikan plaintif. Plaintif oleh itu memulakan tindakan ini terhadap defendan-defendan pertama dan kedua dengan mendakwa kemungkiran kontrak dan terhadap defendan ketiga kerana mendorong kemungkiran atau memperolehi kemungkiran kontrak. Defendan ketiga memohon untuk membatalkan tuntutan plaintif di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah 2012 dengan berhujah bahawa ia adalah jelas dan nyata tidak boleh dipertahankan. Adalah kes plaintif bahawa kemungkiran kontrak membentuk tindakan mengambil balik kerja-kerja yang diawardkan kepada plaintif dan award seterusnya daripadanya kepada kontraktor baru mengakibatkan penamatan pelantikan plaintif.

Diputuskan, menolak permohonan dengan kos sebanyak RM5,000:

(1) Tort yang mendorong kemungkiran atau memperolehi kemungkiran kontrak adalah dilakukan apabila pihak ketiga dengan sengaja campur tangan dalam pelaksanaan kontrak yang sah yang telah disimpulkan di antara dua atau lebih pihak lain (lihat perenggan 19).

(2) Ia membentuk tort mendorong untuk memungkiri kontrak jika lima syarat dipenuhi: (a) pertama, mesti terdapat sama ada campur tangan

'direct' atau campur tangan 'indirect' bersama dengan penggunaan maksud yang salah di sisi undang-undang; (b) kedua, defendan mesti menunjukkan mempunyai pengetahuan mengenai kontrak relevan; (c) ketiga, ia mesti menunjukkan mempunyai niat untuk campur tangan dengannya; (d) keempat, dalam membawa tindakan, selain daripada tindakan *quia timet*, plaintif mesti menunjukkan bahawa dia menanggung ganti rugi khas, iaitu, lebih daripada ganti rugi nominal; dan (e) kelima, setakat yang perlu, plaintif mesti dengan berjaya mematahkan apa-apa pembelaan berdasarkan atas justifikasi yang mana defendan mungkin bangkitkan (lihat perenggan 20).

(3) Dalam permohonan di bawah A 18 k 19(1) mahkamah tidak patut menjalankan pemeriksaan ke atas dokumen-dokumen atau fakta untuk memastikan sama ada defendan mempunyai pembelaan. Jika pihak ketiga berpendapat bahawa cara di mana ia bertindak adalah berjustifikasi mengambil kira kelewatan dalam projek, oleh itu ia adalah perkara yang perlu ditentukan di perbicaraan. Defendan ketiga oleh itu gagal untuk menunjukkan bahawa tuntutan plaintif jelas tidak boleh dipertahankan (lihat perenggan 37).]

Notes

For cases on application for striking out, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8782–8808.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Greig and others v Insole and others [1978] 3 All ER 449, Ch D (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105, FC (folld)

Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors [2013] 8 MLJ 157, HC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19(1)

Mohd Zainudin Omar (Nurul Izza bt Shamsul Kamal with him) (Zainuddin & Assoc) for the plaintiff.

T Kuhendran (Esther Tan with him) (Zul Rafique & Partners) for the third defendant.

Chan Jit Li JC:

[1] Enclosure (9) is the third defendant's application to strike out the plaintiff's claim under O 18 r 19(1) of the Rules of Court 2012.

[2] The Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 sets out the law on such an application as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19 (1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in *pari materia* with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[3] The plaintiff's cause of action against the first and second defendants is for a breach of contract while its cause of action against the third defendant is for inducing a breach or procuring a breach of contract.

[4] The facts of the case are as follows. The parties' dispute relates to the construction of a breakwater for the new deep water terminal at Kuantan Port, Pahang for the East Coast Economic Region Development Council ('the project').

[5] The third defendant appointed the first and second defendants as contractor to construct this project vide a contract dated the 23 July 2013.

[6] By this contract the first and second defendants, jointly known as Inai Kiara Hwa Chi Joint Venture or IKHCJV ('the contractor'), will take possession of the site on 2 April 2013 and were required to complete the project by 20 October 2015.

[7] The third defendant, however, was unhappy with the lack of progress of the project. To address this issue of delay, the contractor in a meeting dated 8 July 2015 proposed to the third defendant the following plan. The first step will be to divide the remaining uncompleted work into three areas. Then two subcontractors would be appointed to increase the contractor's capacity. The contractor will continue to construct one of the remaining unconstructed area whilst the two subcontractors will each construct one of the remaining two areas.

[8] This plan will expedite the construction of the project as the contractor and the two subcontractors will not only be carrying out the construction simultaneously but each of them will be responsible for a smaller area.

[9] The third defendant accepted the proposed plan. The contractor then proceeded to appoint the plaintiff and one Global Marine Contractors Sdn Bhd as the subcontractors with the plaintiff being awarded the area CH 3600 to CH 4627.

[10] This plan, however, failed to placate the third defendant. A series of meetings were held among the three defendants to resolve this issue of delay. These meetings culminated in the execution of a supplementary agreement on 23 October 2015. By this agreement, the contractor agreed to surrender to the third defendant that part of the project which had earlier been awarded to the plaintiff. The third defendant's was also given the prerogative of appointing a new contractor to construct the surrendered area.

[11] The contractor then terminated the plaintiff's appointment. The plaintiff received notification of the termination through an email dated 10 October 2015, of which I shall refer in detail at the later part of my judgment, leading it to file the present action.

[12] It is the third defendant's contention that the plaintiff's claim against it should be struck out as it is plainly and obviously unsustainable for the following reasons:

(a) the contractor did not commit a breach of contract;

(b) even if there was breach of contract by the contractor, it was never the intention of the third defendant to induce the breach; and

(c) the damages suffered by the plaintiff were not caused by the third defendant but the contractor.

[13] I propose to deal with this application by addressing the following issues:

(a) did the first and second defendants as the contractor commit a breach of contract? and

(b) has the plaintiff by its affidavits, if believed, shown that the third defendant had committed the alleged tort?

DID THE FIRST AND SECOND DEFENDANTS AS THE CONTRACTOR COMMIT A BREACH OF CONTRACT?

[14] It is the plaintiff's case that the breach of contract constitutes of the acts of taking back the works awarded to the plaintiff and the subsequent award of the same to the new contractor resulting in the termination of the plaintiff's appointment.

[15] Encik Kuheran, learned counsel for the third defendant, submits that the contractor could not have committed a breach of contract because of a person known as Daniel Ting. He refers to that Daniel Ting as the 'common denominator' in both the second defendant-company and the plaintiff-company and wears the hat of both companies interchangeably. Daniel Ting, the deponent of all of the plaintiff's affidavits is the director of the plaintiff company. The minutes of the meeting of 8 July also shows that Daniel Ting as the technical director had represented the second defendant in the said meeting.

[16] Encik Kuheran then continues by submitting that the second defendant had attended all of the meetings held subsequent to 8 July. Therefore, the second defendant knew and, more importantly, consented to the very acts which the plaintiff state constitutes the breach. Having consented to those acts, Daniel Ting cannot now, by the mere change of hats, resile and rely on those consented acts as evidence of breach.

[17] I note from the minutes of the meetings on which by Encik Kuheran rest his submissions that Daniel Ting was present only at one meeting — the meeting of 8 July. That was the meeting when the plan to appoint subcontractors was unfurled and agreed to by the third defendant. Thereafter, he was notably absent in all of the meetings. Under such circumstances I find it unsafe, as urged by Encik Kuheran, to conclude that Daniel Ting had knowledge and/or consented to the acts in question.

[18] It is therefore my finding that it remains possible for the contractor to commit a breach of the contract.

HAS THE PLAINTIFF BY ITS AFFIDAVITS, IF BELIEVED, SHOWN THAT THE THIRD DEFENDANT HAD INDUCED THE BREACH OF CONTRACT BY THE FIRST AND SECOND DEFENDANTS?

[19] The tort of inducing a breach or procuring a breach of contract is committed when a third party deliberately interferes in the execution of a valid contract that has been concluded between two or more other parties.

[20] The summary of the law is in *Greig and others v Insole and others* [1978] 3 All ER 449. *Greig*'s case was cited with approval by the Federal Court in *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105. Slade J had held at p 484:

> ... (It constitutes a tort of inducement to breach of contract tort) if five conditions are fulfilled:
>
> First, there must be either (a) 'direct' interference; or (b) 'indirect' interference coupled with the use of unlawful means: see per Lord Denning MR in *Torquay Hotel Co Ltd v Cousins* [1069] 2 Ch 106 at p 138.
>
> As to meaning of 'interference' this is not confined to the actual procurement or inducement of a breach of contract; it can cover the case where the third person prevents or hinders one party from performing his contract even though this be not a breach: see per Lord Denning MR.
>
> Secondly, the defendant must be shown to have knowledge of the relevant contract.
>
> Thirdly, he must be shown to have had the intent to interfere with it.
>
> Fourthly, in bringing an action, other than a *quia timet* action, the plaintiff must show that he has suffered special damage, that is, more than nominal damage: see *Rookes v Barnard* [1964] AC 1129, at p 1212, per Lord Devlin. In any *quia timet* action, the plaintiff must show the likelihood of damage to him resulting if the act of interference is successful: see *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691 at p 703, per Diplock LJ.
>
> Fifthly, so far as is necessary, the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

[21] Thus, in order to determine whether or not the plaintiff has shown that the third defendant had committed the alleged tort, I would have to consider whether the plaintiff has shown that those five conditions were present in that:

(a) there was interference by the third defendant;

(b) the third defendant had knowledge of the contract between the plaintiff and the first and second defendants;

(c) the third defendant had the intention to interfere with the contract;

(d) the plaintiff had suffered more than nominal loss; and

(e) the plaintiff must rebut any defence based on justification.

That there was interference by the third defendant

[22] It is the plaintiff's contention that it was the third defendant's interference which caused the breach. This is denied by the third defendant.

[23] According to the plaintiff, in response to enquiries made in respect of its status as the subcontractor prior to the termination the plaintiff received the

following email (exh TTH1 to encl 9A):

> On Saturday, 10 October 2015, 19:22, Kuantan Breakwater Project ikhcjv@yahoo.com wrote:
>
> Dear Daniel,
>
> We take note of your email below and wish to revert as follows:
>
> 1. We have agreed as per our LOA jointly signed on 8th July 2015 to give PT Kiara Temasek a parcel of the Works, namely form Ch. 4000 to the HEAD (*The Agreement*).
>
> 2. On the 2nd of September till to date 5 nos. of High Level Management meetings have been taking place, chaired by KLCC and attended by Client and IKHCJV representatives. *We can inform you that it is Client's intention to omit part of the works from Ch. 3600 to the HEAD and award to a third party.* Focus of these discussions has been the legal structure wherein such Client intent can be realised without disrupting existing liabilities under the Main Contract. A final draft was presented to us last week for comments and signing.
>
> 3. In view of the above developments, and your brief individual discussions in Kuantan on 21*st* September 2015 with resp. Hj. Kamal, En. Arizan and KLCC's Chairman we can conclude that chances are slim that these works will be awarded to PT Kiara Temasek.
>
> 4. *We therefore have decided to formally terminate The Agreement as per today 10 October 2015*. A letter of the same will be forwarded to you by registered mail.
>
> Kind regards,
>
> Marco Groot
>
> Project Director
>
> IKHCJV
>
> (Emphasis added.)

[24] The contractor's Project Director, one Mr Marco Groot, had by way of this email terminated the plaintiff's appointment. The said Mr Marco Groot had also explained that the termination was on account of the client's ie the third defendant desire to award the plaintiff's work to a third party.

[25] I find Mr Marco Groot's explanation to be evidence of the third defendant's interference.

That the third defendant had knowledge of the contract between the plaintiff and the first and second defendants

[26] I find that there is more than sufficient evidence to show that the third defendant had knowledge of the contract between the plaintiff and the first and second defendants for the following reasons.

[27] Firstly, the appointment of the subcontractors was first mooted at the meeting of 8 July and agreed to by the third defendant. Secondly, pursuant to this agreement, a letter of award was issued to the plaintiff. This letter of award was produced at a meeting on 9 July 2015 wherein the third defendant was present. Subsequent to this, the plaintiff and the first and second defendants executed a contract on 23 July. Both the letter of award and contract were forwarded to the third defendant by the first defendant vide a letter dated 14 August. Last but not the least the plaintiff produced documentary evidence which showed that the third defendant's representative had corresponded with the plaintiff in respect of this project (exh TTH3 to encl 9A is referred.)

That the third defendant had intention to interfere with the contract

[28] Encik Mohd Zainuddin Omar, learned counsel for the plaintiff, contends that the third defendant's intention to interfere with the contract became obvious when it voiced its desire to appoint the third party in place of the plaintiff.

[29] In reply Encik Kuheran submits that this is not so and there was never any intention or desire on the part of the third defendant to interfere. The breach of contract, if any, was the contractor's own doing. In any event, the breach was a natural or foreseeable consequence leading to the supplementary agreement.

[30] In dealing with the issue of intention, Slade J in *Greig*'s case held (at p 485):

> ... If these five conditions are fulfilled and the defendant is shown to have had that intention to interfere with the relevant contract which is necessary to constitute the tort, it is quite irrelevant that he may have acted in good faith and without malice or under a mistaken understanding as to his legal rights; good faith, as such, provides no defence whatever to a claim based on this tort: see, for example *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 per Lord Macnagthen.

[31] The contents of the first defendant's email at para 22 above places the third defendant in a most damaging light. The third defendant's true intent can only be determined after hearing an explanation from the first defendant secured through a trial. It may well be that at the end of the day the evidence exculpates the third defendant but be that as it may, I am of the view that it is inappropriate at this stage to strike out the plaintiff's case (*Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105 followed).

That the plaintiff had suffered more than nominal loss

[32] Encik Kuheran's contends that the third defendant should not be held liable for the plaintiff's loss as it was the contractor's breach which caused the loss. Further, as the contractor had given notice of termination on the 10 October the third defendant entry into the arena was only after the breach had taken place as the supplementary agreement was executed on 23 October.

[33] This argument is obviously untenable. The tort which the third defendant stands accused of does not require the element of privity of contract (see *Q2 Engineering Sdn Bhd v PJI-LFGC (Vietnam) Ltd & Ors* [2013] 8 MLJ 157). And, as the act is one of inducement or procurement, that act has to come before the breach.

[34] On the issue of nominal loss, the plaintiff explained that the project was a major project and required preparatory works. As time was of the essence he undertook those steps immediately which included the purchase and rental of barges and tugs from a company called QSA Marine & Logistics Pte Ltd. Apart from the execution of an agreement with QSA, the plaintiff paid a down payment of USD200,000 (the agreement and receipt are exhibited as exh TTH5 to encl 9A).

[35] This down payment is but a tip of the iceberg and the sum of USD200,000 is not nominal by any ordinary standards and that being so, I am satisfied that the plaintiff has shown that his loss is more than nominal.

The plaintiff must rebut any defence based on justification

[36] The third defendant's stand is that it had acted justifiably as the completion date of the project had been delayed. The act of selecting the new contractor was purportedly to expedite the project.

[37] *Bandar Builder*'s case is very clear that in an application under O 18 r 19(1) the court should not conduct a minute examination of the documents or facts to ascertain whether the defendant has a defence. But if the third defendant is of the view that the manner in which it acted was justified in view of the delay in the project, then it is a matter which ought to be determined at a trial. More so in this case when the plaintiff's October termination came so very soon after first September 2015 ie the date the plaintiff was contractually bound to commence work.

[38] In conclusion I find that the third defendant has failed to show that the plaintiff's claim is clearly unsustainable. This application is therefore dismissed with costs of RM5,000.

Application dismissed with costs of RM5,000.

Reported by Kanesh Sundrum